

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   COOPER INDUSTRIES, INC. ,                   :  
4                   Petitioner                   :  
5           v.                                   :   No. 02-1192  
6   AVIALL SERVICES, INC.                   :  
7   - - - - -X  
8                                   Washington, D. C.  
9                                   Wednesday, October 6, 2004  
10               The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:04 a.m.  
13   APPEARANCES:  
14   WILLIAM B. REYNOLDS, ESQ. , Washington, D. C. ; on behalf of  
15       the Petitioner.  
16   JEFFREY P. MINEAR, ESQ. , Assistant to the Solicitor  
17       General, Department of Justice, Washington, D. C. ; on  
18       behalf of the United States, as amicus curiae,  
19       supporting the Petitioner.  
20   RICHARD O. FAULK, ESQ. , Houston, Texas; on behalf of the  
21       Respondent.  
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| 3  | WILLIAM B. REYNOLDS, ESQ.                   |      |
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| 5  | JEFFREY P. MINEAR, ESQ.                     |      |
| 6  | On behalf of the United States,             |      |
| 7  | as amicus curiae, supporting the Petitioner | 19   |
| 8  | RICHARD O. FAULK, ESQ.                      |      |
| 9  | On behalf of the Respondent                 | 29   |
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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 02-1192, Cooper Industries v. Aviall Services.

Mr. Reynolds.

ORAL ARGUMENT OF WILLIAM B. REYNOLDS  
ON BEHALF OF THE PETITIONER

MR. REYNOLDS: Thank you, Mr. Chief Justice.

May it please the Court:

This is a case involving the Comprehensive  
Environmental Response Compensation and Liability Act, or  
CERCLA, which was enacted in 1980, as amended by the  
Superfund Amendments and Reauthorization Act, which was  
amended in 1986 and is known as SARA.

Both the petitioner, Cooper Industries, and the  
respondent, Aviall Services, are potential responsible  
parties as that term is used in the statute. They are  
prior owners of property sites in Texas, and there was  
hazardous waste that was deposited on those sites prior to  
and during their ownership of the property based on the  
aircraft maintenance operations that went on at the site.

Aviall Services proceeded to engage in cleanup  
activities on its own and undertook to do cleanup work on  
the property. It then sued the petitioner, Cooper  
Industries, for a recovery of those -- of costs of

1 cleanup, a contribution action both under 113(f)(1) of the  
2 Federal statute and also under State law.

3 JUSTICE KENNEDY: It's -- it's Aviall's  
4 complaint, not yours, so I can ask them. But what --  
5 what's your understanding or -- or best conclusion as to  
6 why they didn't sue under 107?

7 MR. REYNOLDS: Well, Your Honor, the original  
8 complaint that they filed had a 107 action and a 113  
9 action. They amended the complaint and went forward only  
10 under 113.

11 JUSTICE O'CONNOR: But why?

12 MR. REYNOLDS: I believe they --

13 JUSTICE O'CONNOR: I mean, what's going on?

14 JUSTICE KENNEDY: Can you tell me why they did  
15 that?

16 MR. REYNOLDS: Yes. I believe they did that  
17 because the Fifth Circuit and other courts of appeals have  
18 said that the 107 action is -- for cost recovery is not  
19 available to one who has contributed to the contamination  
20 of the property, that that is a cause of action that can  
21 be maintained by a innocent landowner -- let's say a  
22 homeowner who didn't have any participation and is --  
23 finds out the that property is contaminated -- but not by  
24 a party that has actually contributed to the -- to the  
25 contaminated condition.

1 JUSTICE KENNEDY: But I had thought that the  
2 district court all but invited them to -- to state a 107  
3 cause of action, and they didn't accept the district  
4 judge's invitation, as -- as I read the record.

5 MR. REYNOLDS: I -- I think what the district  
6 court did is invited them to clarify whether they were  
7 proceeding under 107 or 113, and in the course of the  
8 colloquy at the district court, they made it clear that  
9 they were proceeding under 113 and that they believed that  
10 107 was unavailable to them as a contributor to the  
11 contaminated property.

12 JUSTICE GINSBURG: They -- they said that as a  
13 matter of Fifth Circuit law. I think, is it not true,  
14 that the Fifth Circuit says these two, 107 -- and what's  
15 the other? 113. They're supposed to be merged in one  
16 claim. I thought that was Fifth Circuit law that the  
17 parties were obliged to follow.

18 MR. REYNOLDS: Well, I -- I think what the Fifth  
19 Circuit has said is that if you have a -- an action for  
20 contribution as one who has contaminated the property,  
21 then you must proceed under 113.

22 JUSTICE GINSBURG: So they were doing what the  
23 Fifth Circuit --

24 MR. REYNOLDS: You can't proceed under 107.

25 JUSTICE GINSBURG: They were doing what the

1 Fifth Circuit told them to do.

2 MR. REYNOLDS: Right.

3 JUSTICE GINSBURG: And you can't fault a  
4 litigant for that.

5 MR. REYNOLDS: Well, I -- I don't believe I would  
6 fault a litigant for that, Your Honor. The point is  
7 that in order to proceed under 113, the statute is very  
8 clear that a right of contribution by a responsible party  
9 under 113 is some -- is an action that can be maintained  
10 during or following what is an enforcement action under  
11 106 or 107 of CERCLA brought by the United States or by  
12 the -- or by a State.

13 JUSTICE GINSBURG: As I understand it, this  
14 cleanup was initiated because the State agency said you've  
15 got a contamination problem and if you don't do something  
16 about it, we're going to enforce our law against you.  
17 It's not that it just was -- we're dealing -- not just  
18 dealing with a volunteer. Isn't that so?

19 MR. REYNOLDS: I think that actually the cleanup  
20 of the property was initiated before the State got  
21 involved in -- in conversations. I think that while they  
22 were cleaning up the property, the record shows that there  
23 were -- there were communications with the State in  
24 connection with the activities in the cleanup, but it  
25 was --

1 JUSTICE GINSBURG: Was one -- was one of those  
2 communications you'd better do it, otherwise we're  
3 going to enforce our law against you?

4 MR. REYNOLDS: I don't -- I don't think that the  
5 State compelled the cleanup. I certainly think that the  
6 communications with the State suggested that -- that it  
7 was a good thing that they were cleaning it up, and the State  
8 wanted the property cleaned up.

9 JUSTICE GINSBURG: If --

10 MR. REYNOLDS: But it was not -- there was no  
11 compulsory action by the State.

12 JUSTICE GINSBURG: If it's true that the State  
13 said you've got a contamination problem, cure it, why  
14 would we want to construe Federal law as saying don't  
15 clean up sooner, wait until, say, EPA goes after you? Why  
16 would it make any sense to construe the law that way? I  
17 -- I would think that there would be every reason why you  
18 would want to read it to say clean up sooner, not later.

19 MR. REYNOLDS: I -- I think you can construe  
20 this -- the law to say clean up sooner. The law says --  
21 actually provides explicitly in 113(f)(3)(B) that if you  
22 settle with the State -- if, indeed, the State says to  
23 you, clean this up and clean up it sooner, you can enter  
24 into a settlement with the State to -- to engage in the  
25 kind of cleanup that satisfies what are the requirements

1 for cleaning up these sites, and that if you do that, then  
2 you can come in and sue for contribution because 113(f) (1)  
3 gives you a right of contribution in those circumstances.  
4 So this is not a statute that discourages you from working  
5 with the State. If you are approached by the State and it  
6 says clean up property, it simply says that if you are  
7 approached by the State and you want to work with them,  
8 you have to do it pursuant to a settlement in order to get  
9 contribution.

10 If you don't do that, the other avenue for  
11 contribution that the Federal statute allows is to proceed  
12 in a contribution action during or following an  
13 enforcement action by the Federal Government under 106 or  
14 107.

15 JUSTICE GINSBURG: But you might be sitting --  
16 EPA has got a lot of things on its agenda. You might  
17 sitting -- be sitting around waiting forever till EPA  
18 comes after you.

19 MR. REYNOLDS: Well, there is a process that's  
20 available to everybody to enter into negotiations with EPA  
21 to clean up these sites and to -- and to engage in  
22 settlements that would allow for contribution. The way  
23 that the provision was written -- the 113 provision was  
24 added to the statute -- it actually provides incentives  
25 for parties to come in, to enter into negotiations to get



1 settlements with the Federal and State governments. And  
2 indeed, the -- the statute provides for a right of  
3 contribution if you do that and also protects the party  
4 that's cleaning up from contribution suits that might be  
5 brought by someone else if they engage in those kinds of  
6 discussions and settlements.

7       So the statute is one that has incentives built into  
8 it to work within the structure that -- and the scheme  
9 that Congress devised so as to permit parties that are  
10 intent on cleaning up their -- these sites to go ahead and  
11 clean them up and clean them up under the auspices and  
12 with the -- with the supervision of the Government.

13       And there's a reason for that because when  
14 CERCLA was first passed -- and there was no contribution  
15 provision at that time -- it was enacted because there  
16 wasn't a whole lot of voluntary action. And what Congress  
17 says is we need to get the Government involved. We need  
18 to get them to enter -- give them the tools to get  
19 involved with these sites, to make sure they're cleaned  
20 up. We set out a scheme for it to be cleaned up in a way  
21 that means it's a meaningful, comprehensive cleanup, and  
22 if you follow that scheme that has been devised, you get  
23 the benefit of being able to pursue contribution actions  
24 once you do things in the way that that has been set up by  
25 Congress to ensure it's a -- it's a comprehensive cleanup.

1 JUSTICE KENNEDY: Do you -- do you think there's  
2 a 107 action by one PRP against another?

3 MR. REYNOLDS: I -- I believe that there's --  
4 there is a 107 action by a PRP who is what they have --  
5 the courts have termed an innocent PRP, one who was not  
6 involved in contributing to the -- to the contaminated  
7 condition.

8 JUSTICE KENNEDY: What about in -- what about in  
9 this case?

10 MR. REYNOLDS: I do not think that there --  
11 well, I think that in this case the Fifth Circuit and most  
12 of the other circuits that have addressed it have said  
13 that if you are a contributor to the pollution, your  
14 remedy to go after other PRP's is to avail yourself of the  
15 contribution provision and that you don't have a right of  
16 action for cost recovery under 107 separate and apart from  
17 that.

18 JUSTICE O'CONNOR: Well, that question is open,  
19 is it not? I mean, even if we were to agree with you on  
20 the section 113, why wouldn't we leave it open as to  
21 whether Aviall can go under 107(a)?

22 MR. REYNOLDS: Justice O'Connor, I -- I think  
23 you're -- you are correct that that has not been decided  
24 by this Court.

25 JUSTICE O'CONNOR: Right.

1                   MR. REYNOLDS: And there are -- there are  
2 different courts, lower courts, that have spoken to it.  
3 Generally the lower courts that have spoken to it have  
4 said that with enactment of 113, the right of contribution  
5 provision is the one that should be the applicable way in  
6 which to proceed, and the Fifth Circuit has held that.

7                   JUSTICE KENNEDY: Well, but --

8                   MR. REYNOLDS: But --

9                   JUSTICE KENNEDY: -- if you're -- if you're  
10 going to take the position below that a PRP can't sue,  
11 then maybe that would have some bearing on how we'd  
12 interpret 113.

13                  MR. REYNOLDS: Well, I -- I think that it is  
14 clear, if you read 113, that there's nothing in 113 that  
15 would suggest that this particular PRP would have an  
16 ability to sue under 107. And 113 says you have your  
17 right of contribution during or following a 107, and there  
18 has been no during or following.

19                  JUSTICE STEVENS: Yes, but Mr. Reynolds, there's  
20 a savings clause, and -- and conceivably one could read  
21 the savings clause as saying whatever Federal remedy was  
22 available between 1980 and 1986 is still available. And  
23 if one read it that way, then the question would be, could  
24 this very action have been brought in 1983 or 4? And I  
25 don't know. What -- what's your answer to that question?

1                   MR. REYNOLDS: My answer -- I have two answers  
2 to that question. The first answer, Your Honor, is that  
3 prior to enactment of this amendment, there was recognized  
4 by the courts an implied right of contribution under 107  
5 because the Congress had not addressed it.

6                   JUSTICE STEVENS: Right.

7                   MR. REYNOLDS: That implied right of  
8 contribution was recognized in every case in circumstances  
9 where there had been an enforcement action under 107  
10 and --

11                  JUSTICE STEVENS: Right. I -- I agree with  
12 that. But the question, though, is whether this  
13 particular action would have been recognized when -- when  
14 these -- when the -- the plaintiff is a potentially  
15 responsible party too.

16                  MR. REYNOLDS: There -- there are no cases that  
17 we've been able to find that would have allowed for this  
18 particular action under 107. I think that that question  
19 raises a fundamental problem, as I see it, because a --

20                  JUSTICE STEVENS: No. I agree not under 107.  
21 Was there any implied remedy that was not specifically  
22 covered by a statute prior to 1986?

23                  MR. REYNOLDS: I --

24                  JUSTICE STEVENS: There was -- a contribution  
25 was implied.

1                   MR. REYNOLDS: Contribution -- the contribution  
2 is available in common law, but common law of contribution  
3 does not recognize contribution among joint tortfeasors.  
4 And that would be the kind of 107 action you're implying  
5 here.

6                   At common law, somebody who is a joint  
7 tortfeasor couldn't use contribution to go after another  
8 joint tortfeasor. What you had at common law was shared  
9 liability against a third party, the discharge of the debt  
10 to the third party, and then you go after the other liable  
11 tortfeasor.

12                  And I think that to assume or -- or read into  
13 what 107 provided would have been -- would have required  
14 the court to say that 107 is allowing for a right of  
15 contribution that the common law has never recognized. So  
16 -- and the courts did not do that. The courts implied a  
17 right of contribution only with respect to the 106-107  
18 action.

19                  JUSTICE STEVENS: Well, it's certainly true that  
20 cases that they labeled contribution cases it was exactly as  
21 you define it, but I'm just wondering if there were not in  
22 fact some cases with facts just like this one which,  
23 without specific statutory authorization, the judge found  
24 an implied basis for allowing recovery.

25                  MR. REYNOLDS: The only one where there was a

1 suggestion that we could find, Your Honor, was in a  
2 district court in Florida that got dismissed because there  
3 hadn't been enough government action in the cleanup.  
4 Every other case that we've been able to find were cases  
5 where they implied a right of action for contribution in  
6 circumstances where you -- you had a 106 or 107 action,  
7 and if they allowed for a cost recovery action under 107,  
8 it was because you were dealing with an innocent party  
9 that was seeking full costs.

10 And what Congress did in SARA, in the amendment,  
11 is it's -- it looked at that body of law that was out  
12 there, and it said it was going to make explicit what was  
13 implicit by reason of those cases. And -- and it's quite  
14 clear that that's what Congress set about doing.

15 The -- the language of the savings clause says  
16 that the -- nothing in the enabling sentence shall  
17 diminish a right of contribution in the absence of 106 or  
18 107. I would submit to Your Honor that the question  
19 you've asked about whether there was a 107 cost recovery  
20 action would necessarily have been an action in the  
21 presence of 107. So that was not contemplated by this  
22 statute. If indeed a -- there had been a -- a line of  
23 cases of that sort, Congress was not looking at that to  
24 say that they were codifying that as part of their right  
25 of Federal contribution. That was not what --

1 JUSTICE BREYER: My understanding is -- is right  
2 -- is that 113 says that if there is a civil action under  
3 107, then you get the contribution.

4 MR. REYNOLDS: If there is a civil action --

5 JUSTICE BREYER: Well, and so then -- and -- and  
6 there might be because I was interested in -- you said  
7 that it's true that the common law rule was no  
8 contribution among tortfeasors, but almost everywhere  
9 that's been changed, is my impression, either by statute  
10 or -- or perhaps by judicial decision, so that now you can  
11 read the Restatement of Torts, and it seems to say that in  
12 most instances, for example, this one -- nuisances, say.  
13 Nuisances. There -- there would be a right of  
14 contribution in -- almost everywhere under not old common  
15 law principles, but as the law has -- has changed in the  
16 20th century.

17 MR. REYNOLDS: Well, I think if --

18 JUSTICE BREYER: Is that right? I want to --

19 MR. REYNOLDS: I'm not aware of that, Your  
20 Honor. I think that the right of contribution, as it's  
21 understood today, still contemplates shared liability by  
22 -- by the two parties, the -- the tortfeasors, as against  
23 a third party. And -- and to the extent that there may  
24 have been relaxation in -- in that concept --

25 JUSTICE BREYER: Oh, I see. I see.

1                   MR. REYNOLDS: -- it would only be in terms of  
2 whether you could bring it during the 107 action or  
3 following. And they have said that you don't need to wait  
4 until the 107 action in this case is completed. You could  
5 do it during.

6                   But I believe that is still the case, that for a  
7 right of contribution to exist, it's not one tortfeasor  
8 who can sue for recovery and contribution against another.  
9 It's a situation where you have liability, shared  
10 liability, to third -- to a third party. And in those  
11 circumstances, the right of contribution is recognized.  
12 And that's what Congress set about to codify in the -- in  
13 the provision.

14                  JUSTICE SOUTER: One of your -- I think it was  
15 yours, or an amicus argument for -- for reading 113 is  
16 you say it would have a bearing on reading 107, and that  
17 was that Congress didn't want to permit suits prior to  
18 some definitive resolution of a claim, whether it be by  
19 settlement or whatnot. And the reason was that if -- if  
20 the one joint tortfeasor could sue prior to that time,  
21 there would be liability against another who would still  
22 be open to action by EPA --

23                  MR. REYNOLDS: Right.

24                  JUSTICE SOUTER: -- or even yet a third joint  
25 tortfeasor. Their response to that was EPA resolves lots



1 of actions without complete cleanup, so that the  
2 possibility, even in contribution cases that you would  
3 allow, would be later EPA action against another polluter.

4 What -- what is your response to that, if I've  
5 got it right?

6 MR. REYNOLDS: I think, Your Honor, that where  
7 EPA is involved -- and the reason that it's important it's  
8 involved is it -- EPA assures that the cleanup that we're  
9 talking about is comprehensive, and when it gets involved  
10 and it --

11 JUSTICE SOUTER: So you're really disputing the  
12 -- the fact of -- of their response? In other words, they  
13 say, look, EPA resolve -- settles these things without  
14 complete cleanup, and you're saying that really isn't the  
15 way it works?

16 MR. REYNOLDS: My -- my understanding is that  
17 EPA does, indeed, require that the cleanup be done in  
18 accordance with the National Contingency Plan and the  
19 other requirements that they have in their -- in their  
20 regulations.

21 JUSTICE SOUTER: So that if -- so that if it is  
22 done, there won't be further EPA action against yet  
23 another polluter for that site.

24 MR. REYNOLDS: Well, unless it's outside of or  
25 even in the -- in the provision of the statute. If you

1 have a settlement with EPA, there can be action against  
2 another polluter for some additional pollution that was  
3 not settled and taken care of with respect -- if you have  
4 multiple sites, for example, with respect to the site --

5 JUSTICE SOUTER: Well, if that's the -- if  
6 that's the case then, whether -- whether -- even -- even  
7 in a -- in a case of contribution brought under 113, the  
8 person against whom contribution is obtained might still  
9 be liable to EPA if EPA later proceeds against that  
10 person.

11 MR. REYNOLDS: But -- but the point here that we  
12 were making in our brief and I think is -- is a response  
13 to -- to what you're asking -- the -- the point here  
14 wouldn't be inconsistent liability and it wouldn't be  
15 duplicative liability. It would be liability that would  
16 be attributable with the EPA's involvement for the  
17 specific cleanup that was in question, and you may be  
18 liable for some other aspect, but it wouldn't be the kind  
19 of duplication and multiplication that you'd get if you  
20 read the statute the way respondent --

21

22 JUSTICE GINSBURG: Do I understand your -- your  
23 position correctly that a State or a Federal  
24 administrative order won't do or a State or Federal threat  
25 of enforcement won't do, that the only thing that will

1 count is a settlement -- a signed settlement agreement,  
2 whether it's between the State administrator or the  
3 Federal administrator, but just the -- the mere order that  
4 you clean up, threat that we will enforce if you don't,  
5 that that doesn't count?

6 MR. REYNOLDS: Your Honor, certainly for  
7 purposes of this case, I'm not sure that needs to be  
8 resolved. I would say this, that in a settlement you can  
9 get contribution, if you have a civil action. The courts  
10 have looked at whether an administrative order under 106  
11 that is not necessarily reduced to a -- a judgment,  
12 whether that would qualify as a 106 civil action.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Reynolds.

15 MR. REYNOLDS: And there have been different  
16 views that have been addressed on that.

17 CHIEF JUSTICE REHNQUIST: Mr. Minear, we'll hear  
18 from you.

19 ORAL ARGUMENT OF JEFFREY P. MINEAR

20 ON BEHALF OF THE UNITED STATES

21 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

22 MR. MINEAR: Mr. Chief Justice, and may it  
23 please the Court:

24 The United States submits that section 113(f)  
25 does not allow contribution in the absence of a settlement

1 for civil action for three reasons.

2 First, that's exactly what section 113(f) says.

3 Second, that's consistent with the traditional  
4 understanding of the concept of contribution.

5 And third, that will lead to the most efficient  
6 mechanism for cleanup and settlement.

7 JUSTICE STEVENS: Mr. Minear, the -- I think the  
8 respondent accuses the Government of changing its position  
9 in this case. Would you tell me whether you did change a  
10 -- your position at all, and if so, what is the difference  
11 between your former position and your present position?

12 MR. MINEAR: Yes, Your Honor. This case  
13 presents the first time that the question of whether a  
14 person who is a whole -- wholly a volunteer is entitled to  
15 contribution. We've not addressed that issue before,  
16 except in this case.

17 JUSTICE GINSBURG: Wholly a volunteer? There  
18 was -- there was a State agency in the picture.

19 MR. MINEAR: Yes, there was, but in this case  
20 there was no action that we understand that actually  
21 compelled the -- Aviall to clean up the site. We do -- do  
22 not understand that there was a enforcement action that  
23 was brought against them.

24 If I can continue --

25 JUSTICE GINSBURG: There was a threat of

1 enforcement if they didn't clean up, as I understand.

2 MR. MINEAR: Yes. I understand there was a  
3 threat of enforcement.

4 But if I can continue to answer Justice Stevens'  
5 question. Respondents in the red brief, pages 13 and 18,  
6 they cite two quotations from one court of appeals brief  
7 that was filed about 8 years ago in a case called  
8 Centerior. This was a case that was filed as an appellee,  
9 so of course, the Solicitor General did not review the  
10 brief. I would note that the quote on page 13 is  
11 consistent with our current position. As we said then and  
12 we say now, that in order for a responsible party to sue  
13 another responsible party, they must proceed in  
14 contribution. That's what the quote on page 13 of the red  
15 brief says.

16 On page --

17 JUSTICE STEVENS: There has been no change in  
18 position.

19 MR. MINEAR: On that point, there's been no  
20 change, and in fact we repeated it to this Court --

21 JUSTICE STEVENS: -- I want to know any  
22 change of position and what was it and would you  
23 explain --

24 MR. MINEAR: Well --

25 JUSTICE STEVENS: -- what it was and why?

1                   MR. MINEAR: Yes, exactly. I'm getting there.  
2 But I think it's important to -- what they're  
3 characterizing as a change in position is a consistent  
4 position. I want to point out that we took that very  
5 position in the Pinal Creek invitation brief that we filed  
6 in this case that's cited in page -- at page -- footnote  
7 10 of our invitation brief here and footnote 9 of the --  
8 the brief on the merits.

9                   The second place where they claim an  
10 inconsistency is on page 18 where they cite that -- the  
11 statement in the Centerior brief that says that we are not  
12 saying that 113(f)(1) is the only mechanism for allowing  
13 contribution. And that is in fact true, but we also would  
14 say that a settlement would allow as well -- would allow  
15 contribution as well.

16                  Ultimately, the Centerior brief did not address  
17 the issue that we have here: what happens in the absence  
18 of any type of enforcement action whatsoever or a  
19 settlement? So in fact, this is the first time we've  
20 addressed the issue.

21                  Now, in terms of our internal deliberations in  
22 the -- in the Government, there might well be people who  
23 take a different view with regard to the position we've  
24 taken here from the perspective that the more suits that  
25 are brought, the more cleanup there might be. But

1 ultimately, our obligation is to -- excuse me -- is to  
2 construe the statute according to its terms. And then as  
3 Mr. Reynolds pointed out, section 113(f)(1) makes quite  
4 clear that a contribution action can only be brought in --  
5 in the presence of a pending or ongoing 106 or 107  
6 enforcement action.

7 JUSTICE GINSBURG: Mr. Minear, I was just  
8 reading from this Government brief, which you said is  
9 consistent with your current position on that point. The  
10 plain language of CERCLA 113(f)(1) is not restrictive,  
11 i.e., it does not say that a contribution action may only  
12 -- you read the word only. That's not in the statute --  
13 be brought during or following a civil action under  
14 CERCLA. I'm reading from 32A of the red brief.

15 MR. MINEAR: Yes. And Your Honor, we'd still  
16 say that it does not say that it may only be brought in  
17 the -- in the case of a -- in the absence of a civil  
18 action or a -- a civil action under 106 or 107. It can  
19 also be brought in the case of a settlement as well. So  
20 that's what I mean. This brief is not inconsistent with  
21 what we're saying here.

22 It actually addresses a point that's different  
23 where we have made a -- a modest change in position with  
24 regard to an issue that's not before the Court. This  
25 brief suggests that contribution would be available in the

1 face of a 106 order. It implies that. It doesn't come  
2 right out and say it, but that's certainly the implication  
3 of the brief. Now, there's no 106 order in this case.

4           And the problem with allowing contribution in  
5 the case of a 106 order is that section 113(f)(1) speaks  
6 of civil actions. It doesn't speak in terms of  
7 administrative orders. It does allow contribution in the  
8 case of an administrative settlement. So if, for  
9 instance, the Government issues an administrative order  
10 and the party agrees to comply with that administrative  
11 order through an administrative order on consent, that  
12 would entitle the party to contribution.

13           Now, the reason why this is important is because  
14 it's our view that contribution should only be available  
15 consistent with the common law principle of contribution  
16 in the case in which there's an extinguishment of the  
17 underlying liability. That is the very essence of  
18 contribution, that there is some third party liability  
19 that is being resolved. And what 113(f) requires is that  
20 -- that the liability for the State or Federal Government  
21 to be resolved, in whole or in part, through either an  
22 enforcement action or a settlement.

23           Now, this position is entirely consistent with  
24 the principles of the -- the common law, and in  
25 particular, I'd point to the Restatement (Third) of Torts,



1    which in comment 23 makes clear that in order to have  
2    contribution, you have to extinguish the underlying  
3    liability.

4               What's more, this position also is -- does not  
5    discourage voluntary settlement. All it requires is that  
6    if a party wishes to voluntarily clean up a site and also  
7    seek contribution, then it needs to reach a settlement  
8    with the Federal or State government to ensure that the  
9    cleanup is going to be done in accordance with the  
10   National Contingency Plan. The National Contingency Plan  
11   is a volume of Federal regulations that specifies how  
12   cleanups need to be done.

13              By reaching a settlement with the Federal  
14   Government on -- on the -- the details of the cleanup, it  
15   relieves a Federal court of having to make that  
16   determination in a contribution action. As it stands  
17   right now in a case such as this, the Federal court is  
18   going to be forced to make the determination of whether or  
19   not there is compliance with the NCP. And that's a highly  
20   technical issue and it's an issue that ought to be  
21   addressed in the first instance by the Federal or State  
22   officials who are experts in these matters. As it stands  
23   right now, if there is no extinguishment of the underlying  
24   liability, the court is going to have to -- the Federal  
25   courts are going to have to resolve these issues without

1 the guidance of those people who are most knowledgeable on  
2 that very issue.

3 JUSTICE GINSBURG: Mr. Minear -- Minear, I have  
4 a practical question. It -- it seems like EPA has higher  
5 priorities, properly has higher priorities than -- than to  
6 be making deals with each person who wants to clean up a  
7 contaminated site. And you said you have to get the  
8 settlement. How mechanically -- how easy it is -- how  
9 easy is it for someone in the position of Aviall Services  
10 to say, EPA, we've been told that we've got a contaminated  
11 site? Cooper contributed to it. We'd like to get this  
12 cleaned up quickly. Would you give us a settlement?

13 MR. MINEAR: Well, we assume -- this is the --  
14 the warnings about this site were originally brought by  
15 the State officials, and we assume that the State  
16 officials would have happily entered into a settlement  
17 agreement that would have obligated Aviall to clean up the  
18 site. There's nothing in the record that indicates the  
19 State that took notice of this site would not have been  
20 willing to do so. And under 113(f)(3)(B), an  
21 administrative settlement or a judicial settlement with  
22 the State would entitle them to contribution.

23 What's more, they can obtain contribution under  
24 State law. And in fact, Aviall indicated -- and it's  
25 cited at the petition appendix, page 99a, that this was

1 primarily a contract action. The CERCLA action was  
2 brought primarily --

3 JUSTICE GINSBURG: But as far as -- I just want  
4 to know if it's a realistic choice.

5 MR. MINEAR: Well, we think that in the case --  
6 that obviously, EPA has many things on its plate. And if  
7 the -- there might be cases where, in fact, the  
8 transaction costs are such that EPA will believe it was  
9 better addressed by the State rather than the Federal  
10 Government. But in those cases too, it's likely that a  
11 suit in contribution is going to entail very high  
12 transaction costs as well, and so in those cases in which  
13 contribution is most likely to be sought, those cases that  
14 are large, major settlements, EPA is going to have the  
15 highest incentive to pay attention to -- .

16 JUSTICE GINSBURG: But you say the whole -- this  
17 whole thing could have been cured if Aviall had followed  
18 up with the State enforcer and said, give me a settlement  
19 agreement.

20 MR. MINEAR: Yes, that's absolutely right.  
21 Under 113(f)(3)(B), if they had entered into a judicial --  
22 administrative settlement with the State, that would  
23 entitle them to contribution. What's more, under the  
24 State law, which is Texas Health and Safety Code  
25 361.344(a), all they need for State contribution is to

1 engage in a cleanup that's been approved by the State. So  
2 there are plenty of avenues for cleanup in these cases and  
3 for contribution through various mechanisms. CERCLA is  
4 not the only mechanism that's available here.

5 And as I pointed out before, the parties made  
6 the -- have stated this was primarily a contract action.  
7 This began as a contract action in which CERCLA was only  
8 pled in order to engage -- to obtain Federal court  
9 jurisdiction.

10 I'd like to address one other issue here that's  
11 been raised by the parties, and I assume that respondents  
12 will raise that. And that is the question of Federal  
13 cleanup. And I would point out that CERCLA is only one of  
14 many programs that are provided to clean up Federal sites.  
15 The reply brief of petitioner cites, for instance, the  
16 Defense Environmental Reparation Program, 10 U.S.C. 2701,  
17 in which Congress directly appropriates funds for cleaning  
18 up formerly used defense facilities. There are many  
19 mechanisms in which the United States provides for that  
20 cleanup apart from CERCLA and it does it in CERCLA as  
21 well.

22 Thank you, Your Honor.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.

24 Mr. Faulk, we'll hear from you.

25 ORAL ARGUMENT OF RICHARD O. FAULK

1                                   ON BEHALF OF THE RESPONDENT

2                   MR. FAULK: Thank you, Mr. Chief Justice. May  
3 it please the Court:

4                   The very first thing I want to do is clear up  
5 what I consider to be the two most persistent myths in  
6 this case.

7                   The first one is that we didn't bring a 107  
8 action. Justice Kennedy asked about it. Justice O'Connor  
9 asked about it. We pleaded this case. I pleaded this  
10 case. I drafted the complaint in this case. I drafted  
11 the fifth cause of action in that case. And in this case,  
12 we pleaded specifically on the very first page of the  
13 complaint a claim under 107 and section 113. When I  
14 pleaded the fifth cause of action, which was liability  
15 under CERCLA -- that's how it was nominated -- I pleaded  
16 that this was a cause of action brought pursuant to  
17 section 107 and section 113(f).

18                  Now, why did I do that? I did that because the  
19 controlling law of the Fifth Circuit at the time, as  
20 Justice Ginsburg recognized, specified that the cause of  
21 action for contribution under CERCLA is derived from  
22 section 107 in the first place, and that the mechanism for  
23 that, for bringing that cause of action in certain  
24 circumstances is governed by section 113. And so, yes, we  
25 pleaded a 107 action.

1                   We do not have -- there is no right of cost  
2 recovery under CERCLA by contribution or otherwise.

3                   JUSTICE BREYER: It doesn't -- what it says --  
4 in the complaint here that I have, it says pursuant to  
5 CERCLA -- then you cite 113 -- Aviall is entitled to seek  
6 contribution from Cooper as a person liable or potentially  
7 liable under CERCLA 107. But you don't say liable to you.  
8 You don't say you're bringing it under 107. I mean,  
9 obviously, they are a person who's potentially liable  
10 under 107, but is that what you mean by asserting a 107  
11 claim? I mean, I could go sue them and claim they're a  
12 person liable under 107. Anybody could in the world, and  
13 is that what you're doing there, saying --

14                  MR. FAULK: I'm asserting a consolidated claim  
15 under section 107 and 113, exactly as the Fifth Circuit --

16                  JUSTICE BREYER: You say they are a person who's  
17 liable under 107. You say you're bringing the action  
18 under 107? No. You say you're bringing it under 113.

19                  MR. FAULK: Well, Your -- Your Honor, I -- I  
20 would just respectfully disagree with the way --

21                  JUSTICE BREYER: All right, I see. But I have  
22 the right language anyway, and I better read it again is  
23 your point.

24                  MR. FAULK: I -- I would suggest that's  
25 important, and it's also important to review the colloquy

1     that we had with the district court when the district  
2     court --

3                 JUSTICE STEVENS: I just -- I just reviewed that  
4     colloquy, and there you said you did not draft the  
5     complaint.

6                 MR. FAULK: Well, I -- I drafted the amended  
7     complaint, Your Honor.

8                 JUSTICE STEVENS: Oh, okay.

9                 MR. FAULK: The original complaint was not the  
10    one I originally drafted. But the actual cause of action  
11    that was asserted in the fifth cause of action I did, in  
12    fact, draft.

13                The colloquy that went on in the district court,  
14    Judge Fitzwater tried to pin me down on the question of  
15    whether or not we had a 107 cause of action, and I very,  
16    very specifically cleaved to the idea that we were  
17    asserting the blended cause of action that was not only  
18    recognized by the court in Geraghty v. Miller in the Fifth  
19    Circuit, it's also recognized by this Court in the Key  
20    Tronic decision, which is -- wasn't even mentioned by my  
21    opponent during the discussion.

22                But in Key Tronic, which was a case that  
23    involved the situation where someone had brought a cause  
24    of action trying to recover. A PRP, a clear PRP had  
25    brought a cause of action pursuant to State enforcement to

1 recover the costs associated with it. This Court  
2 recognized that section 113 had a cause of action,  
3 recognized the cause of action, but that there was a  
4 similar and somewhat overlapping cause of action within  
5 section 107 for the same relief. What we tried very  
6 carefully to do, Your Honor, was to plead ourself into the  
7 overlap.

8 JUSTICE O'CONNOR: Well, in this case, has the  
9 court below directly ruled on whether there's a 107 cause  
10 of action here?

11 MR. FAULK: No, Your Honor, I do not believe  
12 there has been a specific ruling.

13 JUSTICE O'CONNOR: So that's still open.

14 MR. FAULK: Your Honor, and we have -- we have  
15 asserted that if this Court finds that, in fact, we're not  
16 entitled to recovery under 113, we should be entitled to a  
17 remand to have the issue of the 107 issue resolved. And  
18 so we do have that issue remaining to be resolved.

19 Let me bring up the other persistent myth in  
20 this case and that is that we engaged in a voluntary  
21 cleanup. I realize the -- the Court's issue that it  
22 phrased as it accepted the certiorari was, in fact, that  
23 there was a voluntary issue involved. Aviall did not do  
24 this voluntarily. Aviall acted under a directive of the  
25 -- of the State government very specifically in a



1 proceeding that we received letters for. We've cited that  
2 in the brief. I believe it's on page 6. All of the  
3 record citations that show how the State of Texas said  
4 clean this up or else.

5 JUSTICE SCALIA: Did -- did you object to the  
6 question presented in the petition on that ground, that  
7 the word voluntarily in it was -- was inaccurate?

8 MR. FAULK: No, Your Honor, we did not object to  
9 it.

10 JUSTICE SCALIA: Well, I mean, we take the  
11 questions that are presented when the parties don't --  
12 don't object to it. And -- and the question presented is  
13 whether a party who's not been the subject of an  
14 underlying civil action, --, may bring an action  
15 to recover costs spent voluntarily to clean up properties.  
16 That's what I thought this case involved, and -- and it's  
17 the way I'm going to decide it.

18 MR. FAULK: I understand, Your Honor. The --

19 JUSTICE O'CONNOR: I guess you do admit, though,  
20 that no civil action had been brought against Aviall.

21 MR. FAULK: Absolutely, Your Honor. That is --  
22 that is --

23 JUSTICE O'CONNOR: So that much is clear. And  
24 -- and section 113(f) says, any person may seek  
25 contribution from any other person during or following any

1 civil action under 106 or 107(a).

2 MR. FAULK: That is what the first sentence  
3 says, Your Honor.

4 JUSTICE O' CONNOR: So how do you fit yourself  
5 within that provision?

6 MR. FAULK: We fit ourself not within the first  
7 sentence --

8 JUSTICE O' CONNOR: No.

9 MR. FAULK: -- of that provision at all, Your  
10 Honor, but we fall within the last sentence of that  
11 provision because the -- the last sentence of that  
12 provision specifically provides that we can pursue the  
13 right -- not any right, not multiple rights, but the  
14 singular right of contribution, which is specified in that  
15 -- in -- in section 107. It's -- it's referring back very  
16 clearly to 107. It is not, as the petitioner says,  
17 referring to State law. This is not a savings clause for  
18 State law. CERCLA already contains two saving clauses for  
19 State law. Congress surely knew, when they were enacting  
20 the statute, exactly how to write a savings clause --

21 JUSTICE BREYER: Where does the right come  
22 from?

23 MR. FAULK: The right is derived from section  
24 107 in the first place, Your Honor.

25 JUSTICE BREYER: It says, nothing in this

1 subsection shall diminish the right of any person to bring  
2 an action for contribution in the absence of a section --  
3 in the absence. Now, does that create the right?

4 MR. FAULK: No, Your Honor, it does not. I'm --  
5 I'm saying it -- it expressly recognized and maintains and  
6 confirms the preexisting right under 107, a right that had  
7 existed under --

8 JUSTICE BREYER: Your argument is that the first  
9 sentence says that you or anybody can get contribution  
10 following or during a civil action under 107. And then  
11 the last sentence means anybody can get a right for  
12 contribution any other time as well.

13 MR. FAULK: Well, the last --

14 JUSTICE BREYER: This isn't much of a section.  
15 I mean, it's sort of interesting what it's trying to do  
16 there.

17 MR. FAULK: Your -- Your Honor, I -- I cannot --  
18 I cannot explain the oddity of the section, as -- as I  
19 have heard in some quarters. However, just because it's  
20 odd doesn't mean it's not plain.

21 JUSTICE BREYER: No, no. But in your view  
22 that's how we should read it. We should read it as if it  
23 said if you want \$1,000, go at a certain -- go any --  
24 sorry. You understand what I'm driving at.

25 MR. FAULK: I know what you're driving at, and

1 if I may, I'd like to reply to it. It -- it really is --  
2 it really is -- we have to look at these sections  
3 together, but we also have to take a look at the context  
4 in which section 113 was enacted.

5 At the time section 113 was enacted, the  
6 Government was proposing that contribution only be allowed  
7 to occur when they brought an action at the time the  
8 judgment was rendered. They didn't want contribution  
9 actions within the context of their own actions  
10 frustrating or slowing down the process of enforcement.  
11 And so what happened was that Congress inserted the during  
12 action only to govern the issue dealing with the right of  
13 contribution when an action was pending. Congress did  
14 not --

15 JUSTICE SCALIA: Why -- why isn't a perfectly  
16 adequate explanation of the last sentence that it was  
17 referring to the State causes of action? And indeed, you  
18 -- you assert a State cause of action here.

19 MR. FAULK: Well, one -- one reason, Your Honor,  
20 is that there are already two savings clauses specifically  
21 inserted in CERCLA dealing with State causes of action and  
22 the rights of parties to pursue State causes of action.

23 JUSTICE SCALIA: But this would be a very  
24 logical place to -- to repeat it, even if it is somewhere  
25 else. You're -- you're creating a Federal cause of action

1 under certain narrow conditions, and the last sentence  
2 says, nothing shall diminish the right of any person to --  
3 in the absence of a civil action. It doesn't say we're  
4 creating a right. It -- shall diminish the right. So if  
5 there is any other right, we do -- this does not preempt  
6 any -- any State causes of action.

7 I think it's admirably drafted. I don't think  
8 you have to be ashamed of how to explain it. It -- it  
9 explains itself.

10 MR. FAULK: However admirably drafted -- and I  
11 -- I respect Your Honor's opinion -- the limitation of  
12 that to State causes of action is entirely inappropriate  
13 given the language of the statute. It may, if the Court  
14 chooses, be declared to deal with State causes of action,  
15 but there's no reason that it excludes preexisting Federal  
16 causes of action.

17 JUSTICE SOUTER: Well, there's -- there's one  
18 argument, isn't there? And that is, in the first  
19 sentence, it speaks of -- of a civil action under 107.  
20 Then in the savings clause, it says, nothing, et cetera,  
21 shall diminish the right to bring an action for  
22 contribution in the absence of a civil action. It seems  
23 to be talking, you know, under -- of 107 -- it seems to be  
24 talking about something other than 107.

25 MR. FAULK: I -- I don't agree, Your Honor. I

1 don't think -- I don't think that's a -- that's a proper  
2 reading, respectfully, of the statute. It's talking about  
3 the absence of a 107 action pending at the time the  
4 action is --

5 JUSTICE SOUTER: That may be what it means, and  
6 -- and maybe that's the way it ought to be construed. But  
7 it's not clear, is it?

8 MR. FAULK: I -- I think -- to -- to me, Your  
9 Honor, it's very clear. I think it's very clear that it's  
10 definitely saving causes of action preexisting under 107  
11 because it uses the term, the right of action, not  
12 whatever right of actions exist, not any right of action.  
13 It's specifically referring to a specific cause of action,  
14 and the only other cause of action --

15 CHIEF JUSTICE REHNQUIST: Well, it -- it says --  
16 it says, the right of any person to bring an action.  
17 That's a little different than saying what you just said.

18 MR. FAULK: Well, it depends, Your Honor, how we  
19 -- how we -- if we have to go back to Key Tronic, which I  
20 -- I suspect we do, the question of whether any person is  
21 the person entitled to bring a cause of action under 107,  
22 and I think this Court has held that that is implied under  
23 section 107.

24 JUSTICE BREYER: Have you got any other statute  
25 like this? I -- the -- it's sort of like -- I have found

1 my example. You see in the newspapers sometime, if you  
2 present this coupon to Brooks Brothers, they'll give you a  
3 20 percent discount. And then it says, and if you don't  
4 present the coupon, we'll give you a 20 percent discount.

5 (Laughter.)

6 JUSTICE BREYER: So it's sort of like that, as  
7 you're reading it. And -- and I -- I find it hard to  
8 think of any other example in the statute books that's  
9 like that.

10 MR. FAULK: Well, first of all, Your Honor, I  
11 will -- I will say that there is absolutely no statute  
12 anywhere like CERCLA.

13 (Laughter.)

14 MR. FAULK: And I think all of us would -- would  
15 agree with that.

16 The -- the issue that you're trying to -- that  
17 you're recognizing here is that the statute is permissive.  
18 The statute is in fact permissive. There is nothing in  
19 the language of the statute that suggests it's  
20 restrictive. If, as this Court held, there is a  
21 preexisting right of action under 107, then this statute  
22 impliedly repeals it. Now, implied repeals are distinctly  
23 disfavored by this Court. It's certainly not consistent  
24 with the plain language that some cause of action that  
25 existed under Federal law prior to the time CERCLA was

1 enacted has been impliedly repealed by the statute.

2           The purpose of this statute was to grant the  
3 broadest possible rights of contribution under CERCLA to  
4 serve CERCLA's goals and objects, and those are twofold.  
5 The first is that it's designed to facilitate the cleanup  
6 of contaminated sites. The second is that it's intended  
7 to hold persons responsible for the contamination  
8 responsible.

9           To take -- our interpretation is not at war with  
10 the language of the statute. Petitioner's is. Under  
11 petitioner's situation, there is a clear loophole. There  
12 is a clear vacancy in the statute --

13           JUSTICE SOUTER: What -- what is your answer to  
14 their response to the loophole argument that, in point of  
15 fact, you can -- if you want to undertake this cleanup,  
16 all you've got to do basically is go to EPA and say, look,  
17 we want to get into circumstances in which we can have a  
18 settlement with you so that during or after it, we can --  
19 we can go for contribution? What's your answer to that,  
20 that you have an avenue to get where you want to go?

21           MR. FAULK: My answer, Your Honor, is that the  
22 very purpose of CERCLA, from its inception, was to arm the  
23 Federal Government and private parties with powers  
24 sufficient that would motivate voluntary cleanup action  
25 without Federal involvement. And that would be an



1 antithesis of the goals of the statute.

2 JUSTICE SOUTER: Well, that may -- how about the  
3 answer to the practical question that Justice Ginsburg  
4 raised with your friend on the other side? Is it easy to  
5 do what they suggest, or is it difficult to do what they  
6 suggest?

7 MR. FAULK: In my experience, Your Honor, it is  
8 not easy to do. You stand in line. And the question of  
9 standing in line while contamination exists when you're  
10 within the distance of a lake, at the end of runways, near  
11 the place where this contamination took place, when you're  
12 in a situation where there is movement and concern with  
13 groundwater --

14 JUSTICE GINSBURG: What about the State agency?  
15 I mean, the State agency was telling you you got a  
16 problem, clean it up. Why wouldn't such an agency be an  
17 easier place to get a settlement from than EPA?

18 MR. FAULK: Your -- Your Honor, the question of  
19 both Federal and State agency assumes the resources and  
20 ability and timing and staffing of the agencies to get to  
21 the point, and -- and get it done in an expedited way. I  
22 am not saying that it is not an avenue that could be  
23 pursued.

24 What I am saying is that the entire purpose of  
25 CERCLA was to avoid that. The purpose of CERCLA was to

1 get parties involved in voluntary cleanup so that this  
2 country could have uncontaminated sites, so this country  
3 could have environmental protection and cleanups that  
4 serve the interests of --

5 JUSTICE O'CONNOR: Well, perhaps Congress should  
6 have used different language. That's our problem. We  
7 can't make it up.

8 MR. FAULK: Your Honor, I think the language  
9 that Congress used clearly serves the same purposes and  
10 goals within its plain language. We're -- we're here  
11 under -- if anyone is here under the plain banner language  
12 here, we are. We are not suggesting that you have to add  
13 the word only to the statute in order to get to the plain  
14 meaning. We're not suggesting that you have to add the  
15 words, under State law, to the statute to get to the plain  
16 meaning. We're giving effect to every single term in the  
17 statute, all the way down to the term in the statute,  
18 as I previously expressed.

19 JUSTICE SCALIA: No, but you're -- you're  
20 effectively reading out of it the -- the limitation,  
21 during or following any civil action under section 9606 --

22 MR. FAULK: I would --

23 JUSTICE SCALIA: -- because you're saying any  
24 person may seek contribution during or after and they may  
25 also seek contribution any other time. I mean, why -- why

1 have the limitation? You're just reading it out. It  
2 makes no sense.

3 MR. FAULK: Your Honor, I'm not reading anything  
4 out. I'm reading everything in.

5 JUSTICE SCALIA: Okay.

6 MR. FAULK: And I think that's a very big  
7 --.

8 JUSTICE SCALIA: What -- what function does  
9 during or following any civil action under section 9606 of  
10 this statute serve --

11 MR. FAULK: As -- as the --

12 JUSTICE SCALIA: -- given -- given that you  
13 believe the last sentence means there's a cause of action  
14 even when it's not during or following any civil action?

15 MR. FAULK: As the amicus briefs explained, Your  
16 Honor, in the Arco brief at page 20 and in the DuPont  
17 brief at page 15, the -- at the time this statute was  
18 being enacted, the purpose of adding during into the  
19 statute was to preclude the Government from forcing people  
20 to wait until after judgment was rendered to get  
21 contribution in enforcement actions because it was the  
22 Government's position -- and this -- and the -- and the  
23 actual document from the Government is -- is available in  
24 the brief. It's House document number 9932 at page 23.  
25 That is the position the Government was taking, and that's

1    why that specific term was added.

2                   JUSTICE SCALIA:   During.   What about or

3    following?   Why was that --

4                   MR. FAULK:   Or follow -- or following, Your

5    Honor, was -- was something that was in the bill to begin

6    with.   It was added --

7                   JUSTICE SCALIA:   But why?

8                   MR. FAULK:   Or following was in the bill.   They

9    -- they were providing for the right of contribution after

10   judgment, but during was added solely for the --

11                   JUSTICE SCALIA:   Why -- why do you need it?   Why

12   do you need the or following, at least, if you have that last

13   sentence --

14                   MR. FAULK:   I --

15                   JUSTICE SCALIA:   -- that says there's a right of

16   contribution?   Other -- other --

17                   MR. FAULK:   Your Honor, I have to take the words

18   of Congress as they are, as -- as we all do.   I can only

19   say that there's nothing in the statute that says it's

20   restrictive.

21                   JUSTICE BREYER:   So your point is it's emphasis.

22   Is that what it is?   It's emphasis because in fact during

23   or after, the word during adds nothing.   The word, or

24   after, adds nothing.   If you give the last sentence the

25   reading you're giving it, that you say in the historic

1 circumstance where everybody was fighting about this,  
2 Congress put it in really to emphasize that.

3 MR. FAULK: Well --

4 JUSTICE BREYER: Is -- is that basically the  
5 point? Because they were fighting the Department of --  
6 whoever, the DOJ or somebody who had a different view of  
7 it and they wanted to emphasize it.

8 MR. FAULK: If I -- if I can elaborate. The  
9 first part of the statute deals with the rights of parties  
10 at the time an action is pending. The second part of the  
11 statute, the last sentence deals with the rights of  
12 parties at the time the action -- before the action has  
13 been filed. It permits parties without Federal  
14 involvement to do things together in -- without EPA  
15 involvement --

16 CHIEF JUSTICE REHNQUIST: Well, but it -- the  
17 part about during or following, certainly following any  
18 civil action means after that action is concluded.

19 MR. FAULK: Yes, Your Honor. I -- I would agree  
20 with that.

21 I think I've addressed the -- the persistent  
22 issues that we have, but I want to talk a bit about the  
23 issue of the may being permissive as opposed to be  
24 mandatory.

25 I'm not going to stand up here and tell the

1 Court that there aren't statutes under certain  
2 circumstances where this Court hasn't or might not  
3 construe a statute to be mandatory, which uses the word  
4 may. On the other hand, may is -- it's -- that's not the  
5 natural and normal and plain meaning of the word in -- in  
6 this context.

7 In this context, we have a permissive statute.  
8 We have a remedial statute. We have a statute that's  
9 intended to achieve a purpose that is intended in a broad,  
10 remedial sense. And that purpose is consistent with the  
11 goals and objectives of the statute. This Court should  
12 not consider the statute standing alone in a vacuum. One  
13 of the problems I have with the argument of petitioner  
14 here is that they construe the common law like a statute  
15 and they construe the statute like the common law. They  
16 construe the common law as though it's rigid, and even  
17 though CERCLA says you deal with the -- not only the law  
18 as it existed at common law in 1980 or 1986, but you deal  
19 with it in an evolving basis. And it's very important --

20 CHIEF JUSTICE REHNQUIST: Where does it say  
21 that, that you deal with in -- in an evolving basis?

22 MR. FAULK: There -- there is a section of the  
23 statute, and if it comes to me in a moment -- it's in my  
24 brief and it's cited, Your Honor, that you deal not only  
25 with the common law at the time, but at the time as it

1 evolves. And it specifically instructs the courts, in  
2 construing the statute, to deal with the evolving common  
3 law.

4 Common law is evolving. Common law is based on  
5 experience going back to the old Justice Holmes quote.  
6 And we have over 20 years' worth of experience with this  
7 statute in a system that has worked, in a system that is  
8 working to achieve the purposes that CERCLA provided.  
9 Surely one of the important points in considering this  
10 statute is whether or not the interpretation that has been  
11 applied for 20 years, that has governed the settled  
12 expectations of the parties for all this time, that  
13 interpretation should inform this Court as to whether or  
14 not the interpretation we are asserting is consistent with  
15 the law. And it is. It's not at war with the statute.  
16 Petitioner's interpretation is clearly at war with the  
17 statute. It clearly frustrates the parties' purposes and  
18 delays the expeditious progress of -- of cleanups.

19 So if you're dealing with a mandatory or a  
20 permissive construction here, Your Honors, I think the --  
21 the permissive construction, which achieves the purpose of  
22 the statute, which is entirely permissible under the plain  
23 language of the statute, however inartfully it may be  
24 drafted, is the one that should be chosen.

25 There were a couple of other points, if I may

1 bring them up.

2           Petitioners and the -- the United States  
3 Government concede in their -- in their brief essentially  
4 that section 113, the last savings clause, preserves any  
5 right of contribution that is separate and apart from 113.  
6 That refers to the 107 cause of action. That is, in fact,  
7 a matter of declaration in their briefs. So if we're  
8 entirely correct on that point, then we certainly have a  
9 right to proceed here, and I think under those  
10 circumstances, our interpretation should be followed.

11           The purpose of what we're doing here is to get  
12 the Federal Government out of the picture as soon as  
13 possible. Here we will have a multiplicity of litigation.  
14 People will be going to the Federal Government to get  
15 orders from the Federal Government because -- and to get  
16 the Government to sue them, only to disobey those orders,  
17 after they're entered, to get the Government to sue them  
18 There's -- this artificiality of the system that  
19 petitioner is advocating here really belies the entire  
20 purpose of Congress, and I would suggest to the Court that  
21 under the circumstances, the judgment of the Fifth Circuit  
22 should be affirmed because the achievements that it -- it  
23 wrought are in fact consistent with the statute's purpose.

24           If the Court has no further questions, those are  
25 the -- my concluding remarks.



1                   CHIEF JUSTICE REHNQUIST: Thank you, Mr. Faulk.  
2                   The case is submitted.  
3                   (Whereupon, at 11:58 a.m., the case in the  
4 above-entitled matter was submitted.)  
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